

AGENDA REQUEST FORM

FOR: Council Meeting of October 15, 2019

FROM: Council Member Teresa Turk

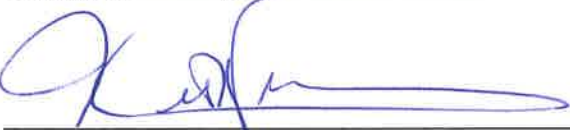
ORDINANCE OR RESOLUTION TITLE AND SUBJECT:

A RESOLUTION TO EXPRESS THE OPPOSITION OF THE FAYETTEVILLE CITY COUNCIL TO THE CURRENTLY PROPOSED ARKANSAS NUTRIENT WATER QUALITY TRADING REGULATION NO. 37

APPROVED FOR AGENDA:


Council Member Teresa Turk

9/16/19
Date


City Attorney Kit Williams
Approved as to form

Sept 16, 2019
Date



OFFICE OF THE
CITY ATTORNEY

DEPARTMENTAL CORRESPONDENCE



Kit Williams
City Attorney

Blake Pennington
Assistant City Attorney

Jodi Batker
Paralegal

TO: Mayor Jordan
City Council

CC: Tim Nyander, Utilities Director
Don Marr, Chief of Staff

FROM: Kit Williams, City Attorney

DATE: September 17, 2019

RE: **Must NANTRAG obtain the City of Fayetteville’s vote now to approve the final draft of the proposed Nutrient Water Quality Trading Regulation?**

The organizing Agreement to establish NANTRAG was signed by the mayors of Fayetteville (1st), Springdale (2nd), Bentonville (3rd) and Rogers (4th) in May or June of 2016. This Agreement states: “10. Amendment: This Agreement may be amended by unanimous vote of all then-existing members.” Thus, all members can rely upon the effectiveness of this Agreement unless and until all members agree to change a provision.

In “6. Decision Making,” the agreement states:“ A unanimous vote of the members, which may be contingent upon any necessary authorization by their respective City Councils, is required for the following:

...

d. Approval of final draft regulations to be submitted for consideration by any state or federal agency with jurisdiction over Group-related matters.”

On May 10, 2019, the official Minutes reflect that after some minor revisions or additions, the following occurred: “Bender (for Bentonville) made a motion to go forward with the proposed responses with the alternative language included. Nyander seconded it. All were in favor. The motion passed.”

Was this action the “Approval of final draft regulations to be submitted for consideration by any state or federal agency...”? Minutes of later meetings of NANTRAG clearly show that what had been presented was not the **final** draft regulations.

“Future direction of legal counsel was discussed by Gates. He stated the next step is to submit the package of response summary as approved by this group to Legislative Council for their review and approval... Then there is another 45 days before the

Commission will review for final approval.” It is not exactly clear what “the package of response summary” is. Statements in later meetings show it could not be the “final draft regulations to be submitted for consideration by any state or federal agency...”

Another meeting of NANTRAG was held on June 21, 2019 when they considered Fayetteville’s request for a 60 day pause. The Fayetteville Water and Sewer Committee “requested a pause in action by the Group to consider making further changes in the draft regulation based upon comments from Beaver Water and the Committee.”

NANTRAG’s attorney stated (according to the official minutes) “that the Group is only responding to the City of Fayetteville’s request and is limited to consideration by those two entities (City of Fayetteville and Beaver Water District). Bender (City of Bentonville) stated that if we did open it up beyond those two entities, it would be considered yet another comment period...”

“Huffman (Rogers Water Utility) said that out of respect for the Mayor of Fayetteville, they would vote for a 60 day, but feels this is good legislation and are ready for this to be enacted... Motion passed.” If the NANTRAG designated representatives of the member entities were “ready for this to be enacted,” then they had not yet “enacted” it. This was not yet in final draft form since some changes were certainly going to be considered during the 60 day pause.

On August 16, 2019, NANTRAG again met. The minutes state “Opportunity for statements from the public. Chair Stewart (Springdale Water Utilities) limited speaking to 5 minutes per speaker. In all eleven (11) individuals from the public made statements.” These including two from Beaver Water District and one from the City of Fayetteville, Council Member Turk. That means eight (8) were not representing either the City or Beaver Water so according to the previous minutes this would have to “be considered yet another comment period.” Stewart (Springdale Water Utility) If so, what was being discussed could not be the FINAL draft regulation because it was still subject to change.

Later “Nyander motioned to go through the document with Beaver Water District and the City of Fayetteville topic by topic. Motion was seconded by Bender (City of Bentonville). All voted in favor. There was a lot of discussion on various topics... Bender proposed a change in the definition of ‘Watershed’, (which would reduce its allowed size)... Nyander seconded Bender’s Motion to amend. All were in favor.” This shows that the draft was amended at this meeting which means it could not have been the “final” draft prior to that time.

“After much discussion and lack of consensus, the Group agreed to each put together a document listing the areas where the members were willing to make changes and submit that to Stewart by the last week in August. A meeting to go over those specific areas was scheduled for Thursday, September 5th at the same location..”

Obviously this draft not only was amended on August 16th, but additional changes were going to be offered and later decided at the September 5th meeting. When you are changing or amending a document, it is not yet a "final draft" which could properly be submitted to state regulatory authorities.

In addition, such an important decision about whether or not to support the final draft regulations of the proposed Nutrient Water Quality Trading Regulation should be made by the City policy makers, the City Council, rather than City staff. That is why the Agreement provides that any vote for approval of final draft regulations "may be contingent upon any necessary authorization by their respective City Councils..." (Paragraph 6. Decision Making of Agreement.)

The Fayetteville City Council has officially expressed concerns and suggested changes to this proposed draft of the regulation when it passed Resolution 173-14 on August 6, 2019. Since most of the suggested changes have been rejected by the other three cities' representatives, the City of Fayetteville should clearly inform the other members of NANTRAG that the City of Fayetteville does not agree to submit the present proposed regulation to any state or federal agency with jurisdiction over nutrient trading issues.

**NORTHWEST ARKANSAS
NUTRIENT TRADING RESEARCH AND ADVISORY GROUP**

AGREEMENT

The undersigned cities hereby have agreed via resolutions in each municipality, copies of which are attached hereto, to form an informal cooperative group for the purposes set forth herein.

1. Name: The name of the informal cooperative group shall be the Northwest Arkansas Nutrient Trading Research and Advisory Group ("the Group").

2. Informal Joint Cooperative Action: This Agreement is intended by the members to be an informal joint cooperative action entered into and enforceable pursuant to Ark. Code Ann. § 25-20-104(h). No delegation of municipal authority or responsibility is made by the members to the Group, and the purposes of the Group are agreed to be valid public purposes of each of the respective members.

3. Membership: Membership in the Group is voluntary and open to any city of the first or second class or county within the Illinois River Watershed or the White River Watershed.

a. The initial members of the Group are the City of Bentonville, the City of Fayetteville, the City of Rogers, and the City of Springdale.

b. Additional members may be added to the Group with the unanimous consent of the then-existing members.

4. Purposes: The purposes of the Group are as follows:

a. Joint development of nutrient water quality trading regulations for proposal to the Arkansas Department of Environmental Quality, the Arkansas Pollution Control and Ecology Commission, the Arkansas Natural Resources Commission, and/or other applicable state and/or federal agencies;

b. Exploration of potential nutrient water quality trading projects, including one or more possible pilot projects; and

c. Contracting with professionals necessary to accomplish the Group's objectives. Professionals shall include, but are not limited to consultants, attorneys, engineers, and environmental scientists. Procurement of professional services shall be in accordance with Ark. Code Ann. § 19-11-801 and other applicable law.

5. Pro Rata Payment of Expenses: The Group shall develop a budget for the accomplishment of the aforementioned purposes and, upon the establishment of actual expenses under such budget, the members shall seek the necessary funding from their respective city councils and/or water and sewer commissions or departments for payment of their pro rata shares of such expenses.

6. Decision Making: Unless otherwise set forth in this Agreement or by resolution of the Group, all decisions of the Group shall be made by majority agreement of its members. Voting shall be on the basis of one-member, one-vote. A majority of the members shall constitute a quorum for decision-making purposes. A unanimous vote of the members, which may be further contingent upon any necessary authorization by their respective City Councils, is required for the following:

- a. Designation of joint Group projects;
- b. Selection of contractors or professionals engaged to do work on behalf of the Group;
- c. Pledging of funds for designated Group activities; and
- d. Approval of final draft regulations to be submitted for consideration by any state or federal agency with jurisdiction over Group-related matters.

7. Designated Representatives: Each member shall designate one person as the member's Designated Representative to the Group, as well as a secondary or proxy representative. Each Designated Representative shall attend the Group's meetings in person or via telephone, if possible, or by written proxy. Designated Representatives shall serve until a successor representative is selected by the member.

8. Officers: The members shall select a Chair and a Vice Chair/Secretary for two-year terms. Such officers must be a Designated Representative of a member. In the event of a vacancy in the position of Chair, the Vice Chair/Secretary shall succeed as Chair for the remainder of the two-year term with a new Vice Chair/Secretary being selected for the remainder of the two-year term. In the event of a vacancy in the position of Vice Chair/Secretary, a new Vice Chair/Secretary shall be selected for the remainder of the two-year term.

9. Time and Place of Meetings: Meetings shall be held at a time and place to be agreed upon by the members. Meetings may be held by teleconference, and Designated Representatives (or their proxy) may participate and vote in face-to-face meetings by telephone. Face-to-face meetings shall be open to the public.

10. Amendment: This Agreement may be amended by unanimous vote of all then-existing members.

[Signatures on next page]

CITY OF BENTONVILLE

By: Bob Mc Carlin

Title: MAYOR

Date: June 01, 2016

CITY OF FAYETTEVILLE

By: Frank Jackson

Title: Mayor

Date: 5/5/16

CITY OF ROGERS

By: Liz Smith

Title: Mayor

Date: 6/15/2016

CITY OF SPRINGDALE

By: Doug Spraupe

Title: Mayor

Date: 5/11/16

Northwest Arkansas Nutrient Trading Research and Advisory Group

Friday, 10 May 2019

MINUTES

The Northwest Arkansas Nutrient Trading Research and Advisory Group (Group) met on Friday, May 10th at 10:00am. Present were Brad Stewart (Springdale Water Utilities), Mike Bender (City of Bentonville), Tim Nyander (City of Fayetteville), and Jene' Huffman-Gilreath (Rogers Water Utilities). Others present: Allan Gates and Jordan Wimpy (Mitchell Williams Law Firm), Teresa Turk (Fayetteville City Council), Greg Weeks (Jacobs), and Nicole Hardiman (IRWP). Chair Stewart called the meeting to order at 10:02am.

Minutes of the January 17th meeting were reviewed. Gates and Bender offered four spelling edits. Revised minutes are attached. Motion to accept minutes as amended was made by Nyander and seconded by Bender. All in favor, motion carried.

Stewart recognized visitors and asked if there were any comments. Seeing none, Stewart moved on to updates from the legal team.

Gates stated that the draft legislation we had been working on passed in General Assembly and is now a law. User fees to support nutrient trading can be assessed at either end or both of the trade (subject to ADEQ's discretion). Representative Lundstrum and Senator Eads, both of Springdale, sponsored the legislation. As a general update, there is no further action needed by the group just preparation of response to comments.

Mr. Wimpy handed out copies of the comments and proposed responses to comments to the group. The first item that the group needs to decide is on page 18, Sec 3c with regard to inspection of non-point source projects. Originally it was suggested that this be stricken, however in the supplemental comment period Farm Bureau and ANRC asked to have this put back in. They stated ANRC has a strong relationship with farmers, and advocate restoring the original version of 3c. ADEQ requested a caveat that says that nothing in this section would affect the regulatory authority of ADEQ. Stewart asked if legal counsel had a recommendation. Gates said he did. He described the downside to each alternative.

1. Concern about ADEQ not agreeing
 - a. ADEQ does not have an issue neither does EPA apparently
2. Downside to leaving out is that Farm Bureau would encourage farmers to not participate in trades

ANRC does not want to be regulatory body that makes the final decision, but would like to review and comment before trades go to ADEQ. They (ANRC) do not have a hearing officer or a process set up to handle regulating trades or disputes. Gates believes it will never come in to play needing Sec 3C because the inspection program would have to completely breakdown and at that point there wouldn't be any trades occurring.

Stewart recognized Ms. Turk for a question. She asked how we would know if an inspection program was working. Stewart stated that the way the regulation is designed, the inspection process would have to be approved for each project and it would function like an NPDES permit. Each utility would have to submit the permitting document each month with the reporting requirements. Each project would have

a different inspection process depending upon the type of project as well. Ms. Turk asked if incorrect reporting occurred what would happen and is there a process to ensure there is a follow up to guarantee it is accurate. Stewart stated that there are civil and criminal penalties associated with incorrect reporting and it is taken very seriously. Gates follow up stating that this will be addressed on two different levels. For a utility to allow use, they have to receive a permit modification. Some project would be monitored by a photograph like in the case of fences. The nature of the inspection would depend up on the credit project.

Stewart asked, based upon the two options, what legal counsel's recommendation would be. Gates stated that he would recommend the alternative response be reinserted under Sec 3K. Stewart stated that Springdale's stand point is, since ADEQ has the final regulatory authority, they (Springdale Utilities) don't have an issue with the alternative response. Nyander stated that this allows more safeguards and more "eyes on the project". Bender and Huffman stated they are for it as well. Stewart stated that we will need a motion to accept one of the responses. Nyander made a motion to go with the alternative response to place Sec 3C under Sec 3K with the caveat requested by ADEQ. Bender seconded. All were in favor and motion passed.

Stewart recognized Wimpy for the second comment with a proposed change. Wimpy stated the next issue to address was comment number 51 on page 39. This comment requests there be restrictions to trades in the same watershed. The original response was that no additional language was necessary. The alternative response states that the trade language does appropriately limit where trades can occur, but a new Sec 5 is recommended stating that the nutrient trading credits may only be used in the watershed where generated. Stewart asked if legal counsel had an opinion. Gates stated they did and that the new alternative language would help eliminate concern. This will give an assurance to those who had concerns regarding inter-watershed trading. Stewart asked if this eliminated the watershed definition on credit generator. Gates said when a modification is applied for they have to state which watershed they are located in. Nyander, Bender and Huffman all stated that they thought this was a good idea. Huffman made a motion to accept the alternative response to add Sec 5. Nyander seconded. All were in favor, and the motion passed.

None of the other comments required action by the group. Stewart asked if there was any desire from the group to address any of the responses. Nyander asked Gates and Wimpy if there were any comments they would like to talk about. Gates stated that the two already discussed were those needing action and were the ones they felt a need to discuss with the group.

Stewart asked that since there were not additional responses to consider if the packet was what legal counsel recommended submitting. Gates replied yes. Stewart stated that he believes this should lead to a very good, workable program.

Nyander asked if we could allow for the public guests to comment. Ms. Turk was recognized and she stated that she still shares concerns along with other environmentalist that not enough oversight and tracking is in this proposed rule. She thinks there could be a lot of abuse. Stewart said that he thinks a lot of safe guards are in place and that NPDES permitting system also provides for those additional, serious safe guards and that it is important to realize that as well. He said that his and the Springdale Water Utilities opinion is to move forward with the draft of proposed responses. Bender made a motion to go forward with the proposed responses with the alternative language included. Nyander seconded it. All were in favor. The motion passed.

Future direction of legal counsel was discussed by Gates. He stated the next step is to submit the package of response summary as approved by this group to Legislative Council for their review and approval. The Department has to complete their responses to summary and are interested in seeing what the group has approved. Next step is to go before Legislative Council which takes about 45 days to set a meeting. It is possible we could be ready in July. Then there is another 45 days before the Commission will review for final approval. It is possible it would be six months before we are able to get in front of the Commission.

Gates will let us know when ADEQ comments are complete. He will prepare and file a packet to submit to the Commission.

Stewart asked if there were any other requests to move forward. Gates stated that the EPA had taken a strong interest in trading and have shown strong interest in Arkansas's trading program. He would like to continue to be able to talk about the group's plan.

Stewart stated in New and Unfinished Business that if things go well we will have projects ready. He stated this is probably an appropriate time to start preparing.

Next meeting date was not set. The Group will evaluate the need for the next meeting.

Motion to adjourn made by Nyander and seconded by Bender. All were in favor. Meeting Adjourned at 10:58am.

Northwest Arkansas Nutrient Trading Research and Advisory Group

Friday, 21 June 2019

MINUTES

The Northwest Arkansas Nutrient Trading Research and Advisory Group (Group) met on Friday, June 21st at 11:30am in the Commission Room at Springdale Water Utilities. Present were Brad Stewart (Springdale Water Utilities), Mike Bender (City of Bentonville), Tim Nyander (City of Fayetteville), and Jene' Huffman-Gilreath (Rogers Water Utilities). Others present: Allan Gates (via phone) and Jordan Wimpy (Mitchell Williams Law Firm), Teresa Turk (Fayetteville City Council), Greg Weeks (Jacobs), Clell Ford (Beaver Watershed Alliance) and Jessie Green (White River Waterkeeper). Chair Stewart called the meeting to order at 11:35am.

Minutes of the May 10th meeting were reviewed. Gates offered edits via email prior to the meeting. Revised minutes are attached. Motion to accept minutes as amended was made by Nyander and seconded by Bender. All in favor, motion carried.

Steward moved on to Item (C) on the Agenda: Consideration of the City of Fayetteville's request for 60 day pause of Group action on Regulation 37. Based upon some meeting of Fayetteville's Water, Sewer and Solid Waste Committee (Committee), the committee requested a 60 day pause on further action by the Group. Stewart recognized Nyander to elaborate. Nyander stated that on May 28th a special meeting of the Fayetteville Water, Sewer and Solid Waste Committee was called to discuss Nutrient Trading Specifically. Comments made at that meeting were by some members of the community and Collene Gaston of Beaver Water District. They requested a pause in action by the Group to consider making further changes in the draft regulation based upon comments from Beaver Water and the Committee.

Stewart stated that based upon time constraints at this current meeting, the Group would not hear comments from the community but would instead only take action on whether to enact a 60 day pause and set a date and time where we would consider any potential issues brought to the Group from the community. Huffman asked what exactly would be accepted during the pause. Stewart said he would like to talk to the people who have comments to discuss their concerns. Bender asked this was just a pause on further action on the Group. Nyander agreed. Bender asked if the comments are limited to Beaver Water and Fayetteville Water, Sewer, and Solid Waste and not public at large. Nyander said that was what the Committee had asked of him. Huffman asked if the pause was legal. Wimpy stated that it is okay legally for the Group to pause for 60 days. Bender asked if the state was still reviewing comments. Wimpy stated they were still reviewing the same public comments and preparing their separate responses to comment.

Huffman stated she was frustrated after reviewing the previous two years of minutes for NANTRAG and the comments made at the Fayetteville Water, Sewer and Solid Waste Committee. She stated that the Group over the time period of the Group's existence had repeatedly asked Beaver Water District for written comments on the draft and were told that they (Beaver Water) would respond after they saw what had been created by the Group. Huffman was frustrated that the Group is now being asked to pause after having asked Beaver Water to work with the Group over the past two years.

Nyander asked Legal Counsel if by opening this up to Beaver Water and the City of Fayetteville for further comment if that would require the Group to open this up to the greater public again. Wimpy stated that the Group is only responding to the City of Fayetteville's request and is limited to consideration by those two entities. Bender stated that if we did open it up beyond the two entities it would be considered yet another comment period and Stewart said that would have to be approved by the PC&E Commission.

Stewart stated he had frustration as well since the Group has had multiple public meetings over the 3 years and two public comment periods. We also had discussions with other groups. He said he could not foresee what would come up in the 60 day pause that would change his mind at this point. He did state the pause was reasonable to consider the requests from the City of Fayetteville and Beaver Water. Bender stated that he didn't want this to lead to additional pauses from other groups. Stewart said this should not set a precedence. Nyander said that the Mayor of Fayetteville asked for a 60 day pause and that is what he is relaying. Huffman said that Rogers opinion is that out of respect for the Mayor of Fayetteville, they would vote for a 60 day pause, but feel this is good legislation and are ready for this to be enacted.

Nyander made a motion for the Group to pause further action for 60 days to allow comment from City of Fayetteville and Beaver Water District. Second by Huffman. Stewart said that 60 days from June 21st is August 20th. All were in favor. Motion passed.

Stewart brought up Agenda item (D). He asked if the Group would like to set the date for hearing comments. Nyander suggested that the Group allow the City and Beaver Water to gather comments a few days before the Group were to meet as a whole. Huffman stated she would like the comments from both groups (Beaver Water and City of Fayetteville) in writing. Stewart said he would like that as well. A tentative meeting was set for August 15th at 10am at Springdale Commission Room.

Stewart asked Nyander if he had anything else the needed to be brought before the Group. He stated he did not.

Motion to adjourn made by Nyander and seconded by Bender. All were in favor. Meeting Adjourned at 11:56am.

Northwest Arkansas Nutrient Trading Research and Advisory Group

Friday, 16 August 2019

MINUTES

The Northwest Arkansas Nutrient Trading Research and Advisory Group (Group) met on Friday, August 16th, 2019 at 1:30pm at the Illinois River Watershed Partnership building in Cave Springs, Arkansas. Present were Brad Stewart (Springdale Water Utilities), Mike Bender (City of Bentonville), Tim Nyander (City of Fayetteville), and Jene' Huffman-Gilreath (Rogers Water Utilities). Others present: Allan Gates and Jordan Wimpy (Mitchell Williams Law Firm), Teresa Turk (Fayetteville City Council), Lane Crider and Colene Gaston (Beaver Water District), Greg Weeks (Jacobs), Clell Ford (Beaver Watershed Alliance), Doug Thompson (NWADG), Brian Thompson (BRWA), Drew Lee (WRW), Jane Kellett and Maribeth Lynes (Highland Community Assoc), Kaitlyn Nolkes (WRW), Taylor Bridges (WRW), Duane Woltjen, Susan Norton (City of Fayetteville), Carol Christoffel, Carol Bittig, Aaron Thompson (KRWP), Cody Hudson (BWD), Ginny Masullo, Ryan Benefield (ANRC), Alan Pugh (City of Fayetteville), Margaret Britain (Lake Fayetteville Watershed Partnership), and Jessie Green (White River Waterkeeper). Chair Stewart called the meeting to order at 1:34pm.

Minutes of the June 21st meeting were reviewed. Bender noticed Stewart's name was Steward on the 3rd paragraph. Motion to accept minutes as amended was made by Nyander and seconded by Bender. All in favor, motion carried.

Stewart moved on to Item (C) on the Agenda: Opportunity for statements from the public. Chair Stewart limited speaking to 5 minutes per speaker. In all eleven (11) individuals from the public made statements. Those who took the time to speak were: Carol Christoffel, Ginny Masullo, Brian Thompson, Carol Bittig, Teresa Turk, Duane Woltjen, Clell Ford, Jessie Green, Margaret Britain, Lane Crider and Colene Gaston.

Stewart thanked the public for speaking and mentioned that the Group had agreed to take a 60 day pause for any further action at the request of the City of Fayetteville and Beaver Water District. It was pursuant to that request and pause that we are meeting again. The 60 days expired on August 20th.

Stewart recognized Allan Gates for an update from the legal counsel. Gates stated that the written submittal from Beaver Water District and the City of Fayetteville had been reviewed. Most of the remarks in the submittal were consistent with comments made during the two official comment periods. There was one area that was not mentioned in comment and is more of a Scribner's or procedural issue. That is with the use of Rule instead of Regulation and Division instead of Department. Stewart authorized Gates to make the appropriate edits to the current Regulation No. 37 to be consistent with the desires of the ADEQ. A motion was made by Nyander and seconded by Huffman. All were in favor and the motion passed.

Nyander stated that with all of the revisions and recommendations made by Beaver Water and the City of Fayetteville, the Group take time for dialogue with the two groups on their input. A motion was made by Nyander and seconded by Huffman. All voted in favor.

There was a question from the Group on procedure posed to counsel. Gates stated that ADEQ has not finished response to comments at this point. He also stated that at this point the Group had approved the regulation and the response to comments.

Nyander motioned to go through the document with Beaver Water District and the City of Fayetteville topic by topic. Motion was seconded by Bender. All voted in favor.

There was a lot of discussion on various topics as can be heard in the recordings that will be made available.

Bender proposed a change in the definition of "Watershed". Watershed means an area of land that drains into a water body area no larger than an 8 digit USGS Hydrological Unit Code (HUC). Nyander seconded Bender's motion to amend. All were in favor.

After much discussion and lack of consensus, the Group agreed to each put together a document listing the areas where the members were willing to make changes and submit that to Stewart by the last week in August. A meeting to go over those specific areas was scheduled for Thursday, September 5th at the same location, IRWP Sanctuary in Cave Springs at 1pm.

Motion to adjourn made by Nyander and seconded by Huffman. All were in favor. Meeting Adjourned at 5:57pm.